PART 5 FUNDRAISING AND POLITICAL ACTIVITIES OF THE NATIONAL PARTIES AND ADMINISTRATIONS

Chapter 24: Overview and Legal Analysis

OVERVIEW OF FOLLOWING CHAPTERS

During the 1996 election cycle, spending by candidates, their campaign committees, political parties, other political committees and persons making independent expenditures totaled a record-breaking $2.7 billion.[1] Of that amount, the Democratic and Republican Parties together spent almost $900 million, or one-third of the total.[2] The two presidential candidates, President Clinton and Senator Dole, together spent about $232 million, or almost 10 percent of the total.[3]

One of the primary objectives of the Committee's investigation was to investigate allegations of improper and illegal activities associated with fundraising undertaken both parties to finance this campaign spending. The allegations examined include the alleged misuse of federal property and federal employees to raise funds, the sale of access to top government officials in exchange for campaign contributions, and the circumvention of campaign spending restrictions through such devices as issue advocacy and coordination between the parties and their presidential nominees.

The following chapters will show that the evidence amassed during the Committee's investigation establishes that both political parties engaged in questionable fundraising practices. Both parties scheduled events at government buildings and promised access to top government officials as enticements for donors to attend fundraising activities or make contributions. Both parties used their presidential candidates to raise millions of dollars in soft money donations in addition to the $150 million provided in public financing for presidential campaigns.[4] Both parties worked with their candidates to design and broadcast so-called issue ads intended to help their candidates' election efforts.[5]

Some Members of the Committee charged during the hearings that these fundraising practices were clearly illegal. Others suggested that the federal election laws contain so many ambiguities, and the constitutional protections afforded political speech and association are so sweeping, that the tactics complained of either did not clearly violate the law or could not be legally restricted. The proceedings before the Committee repeatedly document confusion over the legal restrictions that apply to fundraising, unsettled legal questions, and provisions which would benefit from clarifying or strengthening legislation.

During the proceedings, many Committee Members expressed the conclusion that, whether or not fundraising practices used during the 1996 election cycle were illegal, a number of individuals involved exhibited poor judgment and the conduct that occurred created an appearance of corruption of the political process or misuse of federal resources. Offers of meetings with the President, the Speaker of the House, the Senate Majority Leader, or House or Senate committee chairs in exchange for political contributions created the appearance that access to our elected officials was for sale. Allowing large contributors to stay overnight in the Lincoln

bedroom created the appearance that the White House was a campaign prize. Raising and spending millions of soft dollars to air issue ads designed to affect the presidential race undermines the law providing for public funding of presidential elections. The activities of 1996 make clear the need for reform.

LEGAL ANALYSIS

The campaign fundraising practices examined in the following chapters invoke a number of different federal laws, including federal criminal law restrictions on taking official action in exchange for money; federal property restrictions, primarily in the Pendleton Act, on using government resources for campaign purposes; federal personnel law restrictions, primarily in the Hatch Act, on employees participating in campaign activities; and federal election law restrictions on spending and coordination.

While some of the campaign restrictions set out in these laws are clear, other provisions provide insufficient guidance on what conduct is lawful, while ambiguities or limitations in other provisions may hinder criminal prosecutions and civil enforcement actions in this area. Many of these provisions would benefit from legislation strengthening and clarifying intended prohibitions on fundraising practices in federal elections.

Taking Official Action in Exchange for a Contribution

A number of the allegations investigated by the Committee involve suggestions that government officials took action during the 1996 election cycle to obtain or reward a campaign contribution. The alleged actions cover a range of activity, from providing a meeting between a contributor and a federal official, to advancing the contributor's private business interests, to obtaining a change in U.S. policy requested by the contributor.[6]

Several longstanding federal criminal statutes bar government personnel from taking official action in exchange for contributions. For example, the federal bribery statute, 18 U.S.C. § 201, bars "public officials" from taking or promising to take official acts in exchange for "anything of value," including a campaign contribution.[7] The federal extortion statutes, 18 U.S.C. § 872 and § 1951, bar public officials from soliciting funds through a threat of violence, under color of official right, or by causing a victim to fear economic harm if the funds are not provided.[8] A provision in the Hatch Act, 18 U.S.C. § 600, bars public officials from promising any government benefit in exchange for "support of or opposition to any candidate or any political party."[9] Each of these provisions has its own requirements for proving a quid pro quo relationship between the action taken and the campaign contribution.[10]

The law is also clear that to establish a criminal violation, a public official must do more than simply arrange or attend a meeting with a contributor. In a recent letter to the House Judiciary Committee, Attorney General Janet Reno summarized the court decisions holding that public officials who grant access, but nothing more, to contributors do not violate federal law:

> The courts . . . have held that . . . access in exchange for political contributions is not an 'official act' that can provide the basis for a bribery or extortion prosecution. [Legal citations omitted.] Indeed one court has focussed on the constitutional right to 'petition the Government for a redress of grievances' guaranteed by the First Amendment in refusing to find that alleged gifts provided in hopes of access to an elected public official could amount to a scheme to defraud the public of the official's honest services . . . . To the extent that the allegations . . . suggest simply a decision by an elected politician to provide access to political contributors, we conclude that no federal violation is suggested.[11]

These court decisions mean that fundraising activities that promise access to a government official in exchange for a campaign contribution, but nothing more, do not constitute bribery, extortion or any other violation of federal criminal law. In addition, the cases suggest that the courts would strike down as unconstitutional any law which attempted to go farther, and bar contributors from gaining access to public officials, solely due to their contributor status.

While current law provides that candidates who agree to meet personally with contributors solely due to their contributions have not committed an illegal act, the circumstances surrounding particular meetings may nevertheless create an appearance of favoritism or impropriety.

Use of Federal Property

A second set of issues involves the use of federal property in connection with campaign fundraising, including using government telephones to contact contributors or inviting contributors to attend events in government buildings.

The key federal statute is a provision of the Pendleton Act, 18 U.S.C. § 607, which states:

> It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any [federal employee] or in any navy yard, fort or arsenal.

While this provision seems to impose a broad prohibition against soliciting campaign contributions on federal property, its wording and interpretation by the courts have limited its scope.

First, the statute is limited on its face to contributions as defined by section 301(8) of FECA. This definition is a narrow one. It encompasses only "hard money" contributions in connection with a federal election; it does not include, for example, donations in connection with state or local elections, generic party-building activities, or issue advocacy.[12]

A second limitation turns upon case law interpreting where a campaign solicitation takes place within the meaning of section 607. The key case is a ninety-year-old Supreme Court decision, United States v. Thayer, 209 U.S. 39 (1908), which holds that section 607 is violated by

a letter which is written and mailed from outside a federal workplace, and delivered to an individual in a federal office. The Supreme Court held, in an opinion written by Justice Oliver Wendell Holmes, Jr., that "the solicitation was in the place where the letter was received," rather than where the letter was written or sent.[13] By analogy, a telephone call or fax message soliciting a campaign contribution takes place where the call or fax is received, rather than where it originated. This analysis suggests that a telephone call or fax from a government building to a private location would not violate section 607, since the solicitation would occur outside of a federal workplace. This interpretation makes sense in light of the original intent of the Pendleton Act, which was to protect federal employees from being pressured to make campaign contributions while at work.[14]

Federal prosecutions are in line with this interpretation of the statute. In a recent report, the American Law Division of the Congressional Research Service stated it was unable to find any criminal prosecution under section 607 of a campaign solicitation made by mail or telephone from a federal building to a non-federal building:

> In more than 100 years since its enactment . . . the law appears to have been neither specifically construed by any court nor applied in any prosecution to cover one who solicits a campaign contribution from a federal building by letter or telephone to persons who are <u>not</u> located themselves in a federal building.[15] [original emphasis]

A third limitation on section 607 is an exception created for residential and "mixed-use" areas of the White House. Because these areas of the White House serve as the President's personal home, the Department of Justice has long held that they must be treated differently than federal office space. In this context, the Department has held that campaign solicitations made from telephones in the residential and mixed-use areas of the White House, as well as fundraising events held in such areas, do not violate section 607, because the activities do not take place in a "room or building occupied in the discharge of official duties."[16]

These three limitations on the scope of section 607 -- that it does not apply to soft money donations, solicitations directed outside federal buildings, and White House residential and mixed-use areas -- make this provision inapplicable to a number of fundraising incidents before the Committee, such as the telephone solicitations made by the President and Vice President and the White House coffees. These legal limitations are also a primary reason that the Attorney General declined to appoint an independent counsel to investigate allegations that campaign fundraising calls placed by President Clinton or Vice President Gore violated federal law.[17]

A second federal statute affecting the use of federal property in connection with campaign fundraising is 18 U.S.C. § 641, which bars conversion of government property to personal use. The provision prohibits a person from "knowingly convert[ing] to his use or the use of another . . . anything of value of the United States." This provision also has several limitations. First, federal regulations permit incidental use of federal property for otherwise lawful personal purposes, and the Justice Department has determined that, under these regulations, occasional use

of a federal telephone or fax machine for a campaign purpose would not amount to a Federal crime.[18] Second, under 5 U.S.C. § 7324(b)(1) and 5 C.F.R. 734.503(a), the White House is explicitly authorized to use federal property for political activity if there is no cost to the government.[19] Third, the Justice Department has determined that events which take place in the residential and mixed-use areas of the White House, such as the White House coffees and Lincoln bedroom overnights, cannot, as a matter of law, result in criminal conversion, since these areas are provided to the President explicitly for his personal use.[20]

A third statute of interest concerns the use of appropriated funds. While no specific federal statute expressly prohibits spending federal funds for partisan campaign purposes, 31 U.S.C. § 1301(a) states that monies appropriated by Congress may be spent only for the purposes for which they were appropriated.[21] The Comptroller General has interpreted this statute to allow agencies to spend federal funds to further agency objectives but not to carry out "a propaganda effort designed to aid a political party or candidate."[22] In evaluating a particular expenditure, the Comptroller General defers to an agency determination that an expenditure was "in connection with official duties," ensuring only that there was "a reasonable basis" for the agency determination. The Comptroller General has also evaluated expenditures by determining whether they were "so devoid of any connection with official functions or so political in nature that [the expenditures] are not in furtherance of purposes for which Government funds were appropriated."[23] Violations of 31 U.S.C. § 1301(a) are punishable only with administrative or civil penalties such as the recovery of misused funds or removal of a federal employee from office.[24]

The proceedings before the Committee suggest that many persons thought federal law barred all use of federal propery for campaign purposes, with no exceptions or limitations. However, federal law does not presently impose this type of absolute ban, and legislation would be required to achieve that result.

Use of Federal Employees

Another set of issues involves the use of federal personnel in connection with campaign fundraising, including to solicit contributions, attend fundraising events in a government building, or engage in other campaign activities.

The key federal statute is the Hatch Act, 5 U.S.C. § 7321 et seq., which generally permits covered federal employees to engage in voluntary partisan political activities while away from work, but restricts most partisan "political activity" while an employee is on duty, in uniform, or in a government building or vehicle.[25] Section 7323 imposes a few restrictions that apply at all times to federal employees, whether on duty or off. Two of these across-the-board restrictions are that covered federal employees may not "knowingly solicit, accept, or receive a political contribution from any person,"[26] and they are prohibited from using their "official authority or influence for the purpose of interfering with or affecting the result of an election."[27]

The Hatch Act contains a number of exceptions and limitations. First, the Act does not

apply to federal employees in the legislative or judicial branches, including Congressional staff.[28] Second, it does not apply to the President or Vice President.[29] Third, its prohibition on partisan political activity while on duty does not apply to certain White House personnel paid from appropriations for the Executive Office of the President, or to certain federal officials appointed by the President with the advice and consent of the Senate such as members of the Cabinet.[30] These excepted persons are nevertheless subject to the Hatch Act's ban on soliciting or accepting contributions, whether on duty or off.[31] The Hatch Act further requires that political activity performed by a Hatch Act-exempt person while on duty, in uniform or in a government building or vehicle, must either incur no cost to the government or its cost must be reimbursed in accordance with federal regulations.[32]

Together, the exceptions to the Hatch Act mean that a limited number of high-ranking federal officials and White House personnel may legally engage in a wide range of political activities while in a federal building, during working hours, using federal property, so long as the activity does not involve soliciting or accepting contributions and either incurs no cost to the government or the cost is reimbursed.[33] The President, Vice President, Members of Congress and Congressional staff are not subject to any Hatch Act restrictions.

A key legal issue is distinguishing between "political activity" and "official activity." Many White House employees paid by the Executive Office of the President ("EOP") may, as discussed above, engage in either activity, but must ensure that political activity costs are reimbursed. Non-EOP White House staff are essentially barred from engaging in any political activity while working. Hatch Act regulations and opinions prepared by the Department of Jusice's Office of Legal Counsel ("OLC") for the Carter Administration in 1977 and re-stated by the OLC for the Reagan Administration in 1982 provide basic guidelines for distinguishing between "political" and "official" activity. Hatch Act regulations state that, "[p]olitical activity means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group."[34] The OLC defines an activity as "political" if its primary purpose involves the President's role as a candidate or as leader of his political party, such as by appearing at party functions, fundraising, or campaigning for specific candidates.[35] Hatch Act regulations do not define "official" activity, while OLC opinions indicate that an activity is "official" if it relates to the President's policies, programs or legislative agenda, even if it concerns matters on which opinion is politically divided.[36] Travel, appearances, and actions taken by the President and Vice President to "present, explain, and secure public support for the Administration's measures" are considered official activities.[37] By analogy, staff support of the President and Vice President's policies, legislative agenda, programs and initiatives would also be reasonably classified as "official" activity.

Another key legal issue involves determining the costs associated with political activities. Hatch Act regulations state that certain political activity costs do not have to be reimbursed if they are costs that the government has already incurred for official purposes.[38] Examples of political activities that are not considered to incur cost to the government because the government has already paid the expense for other official purposes include: local phone calls, the use of office space and employee salaries.[39] Examples of political activities which do incur costs to the

government include: faxing, copying, and long-distance telephone calls.

These rules are difficult to apply and, in practice, have been applied at times in surprising ways. One key example involves the Office of Political Affairs ("OPA"), an office within the White House first established in 1981 by President Reagan.[40] Since its inception, OPA has served as a liaison between the President and White House staff, and the President's political party and various campaign efforts.[41] OPA performs a number of election-related activities that would appear to meet the definition of "political." However, in 1991, C. Boyden Gray, counsel to President Bush, stated in a memorandum explaining Hatch Act restrictions on White House staff that, "It is important to understand that . . . the official responsibilities that customarily have been performed by the Office of Political Affairs constitute 'official' and not 'political' activities, and the restraints cited here therefore do not in general affect activities and office maintenance or other costs undertaken or incurred in the discharge of such responsibilities."[42] The memorandum cites no regulation, OLC opinion or other legal authority in support of its determination. A 1994 memorandum on Hatch Act restrictions prepared by Lloyd Cutler, special counsel to President Clinton, follows the precedent set under President Bush.[43]

Violations of these Hatch Act provisions are punishable only with administrative or civil penalties such as the removal of a federal employee from office.[44]

The proceedings before the Committee indicate that many persons thought federal law barred federal employees from engaging in any campaign activity during work hours. In fact, current law explicitly permits the President, Vice President, Members of Congress, Congressional staff, and a limited number of federal officials and White House personnel, to engage in a wide range of partisan political activities while on duty or in a federal building or vehicle. One key exception is the broad ban placed on executive branch personnel, other than the President and Vice President, from soliciting or accepting campaign contributions.

Spending Limits, Coordination and Issue Advocacy

A fourth set of issues involves federal election law requirements regarding contribution and spending limits, and coordination between a party and its candidates.

Federal election laws impose a variety of contribution and spending limits on federal campaigns. Contribution limits apply to all federal candidates, including those running for the House, Senate and Presidency. These limits include, for example with respect to an individual, a $25,000 annual overall limit; $20,000 annual limit on contributions to a national political party; and a $1,000 limit on contributions to a specific federal candidate each election. Parties are limited in the amount of direct contributions they can make to federal candidates. In addition to direct contributions, political parties are allowed under 2 U.S.C. § 441a(d) to make a limited amount of coordinated expenditures in connection with a federal candidate's general election.[45] Statutory formulas set the maximum amount of section 441a(d) coordinated expenditures that a party can make with respect to a House, Senate or Presidential candidate. In 1996, each party was limited to spending $12 million on section 441a(d) coordinated expenditures made in

connection with its presidential candidate's general election.[46]

In addition to contribution limits, federal election laws also impose spending limits on presidential candidates who accept public financing.[47] These spending limits are permitted because candidates must voluntarily agree to accept them in exchange for public financing.[48] In 1996, each presidential candidate who accepted public financing agreed to limit expenditures in connection with the primaries to $37 million and in connection with the general election to $74 million.[49]

A key legal issue is whether coordinated efforts between candidates and parties are lawful, and whether this coordination, particularly with respect to issue advocacy, was used unlawfully in the 1996 elections to circumvent federal contribution and spending limits.

The Federal Election Campaign Act ("FECA") and its implementing regulations contain a number of provisions indicating that coordination between a party and its candidates is expected and appropriate. Permitted candidate-party coordinated activities include voter registration drives, get-out-the-vote efforts, generic advertising, joint fundraising events, and the development and distribution of campaign materials such as sample ballots, slate cards, brochures, bumper stickers and yard signs.[50] Each of these activities is typically coordinated between a party and its candidates, pursuant to the role that political parties traditionally play in support of their tickets. With respect to a party's coordinated expenditures under 2 U.S.C. § 441a(d), the FEC has held explicitly that, "consultation or coordination with the candidate is permissible."[51]

Attorney General Janet Reno recently stated in a letter to the Senate Judiciary Committee:

> FECA does not prohibit the coordination of fundraising or expenditures between a party and its candidates for office. Indeed, the [FEC], the body charged by Congress with primary responsibility for interpreting and enforcing the FECA, has historically assumed coordination between a candidate and his or her political party.[52] [original emphasis]

The FEC made that assumption explicit in a 1988 FEC Advisory Opinion stating that a party's "coordination with candidates is presumed."[53] Moreover, the recent Supreme Court case, Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996), examining party-candidate coordination, contains no hint that such coordination is unlawful, holding instead that, in addition to coordinated expenditures, parties have a constitutional right to make independent expenditures and must be given an opportunity to demonstrate that a particular party expenditure was independently made. Some Justices suggested, in dicta, that parties should be able to make unlimited coordinated expenditures with their candidates.[54]

With respect to presidential candidates in particular, FECA currently permits a presidential candidate to "designate the national committee of [his or her] political party as [his or her] principal campaign committee."[55] If President Clinton or Senator Dole had exercised that option, their candidacies would have been not only coordinated with their respective political parties, but the party and the candidate committees would have merged into one entity. This option is

additional proof that federal election law contemplates coordination between presidential candidates and their parties as both lawful and appropriate.

The close relationship envisioned in FECA between candidates and their parties is in sharp contrast to the arms-length relationship envisioned between candidates and nonparty groups like corporations or unions. For example, 2 U.S.C. § 441b(a) prohibits direct corporate and union contributions to candidates. The Supreme Court has repeatedly upheld federal election law provisions erecting barriers between candidates and nonparty entities like corporations and unions; no similar case law separates candidates from their parties.[56]

While coordination between parties and candidates is clearly lawful under FECA in many respects, questions have arisen as to whether their coordination on activities such as raising soft money and broadcasting issue ads constitute a FECA violation.

It is beyond question that raising soft money and broadcasting issue ads are not, in themselves, unlawful. FEC regulations currently allow political parties to raise and spend soft money, and have established an elaborate system for allocating and disclosing federal versus non-federal funds.[57] Candidates are permitted to help their parties raise funds.[58] The courts have repeatedly upheld the right of persons to engage in issue advocacy outside the scope of federal election laws, even when those ads mention candidates and are broadcast close in time to a federal election day.[59]

The specific issues that some have posed are: (1) whether a candidate's extensive involvement in party efforts to finance, develop and place issue ads converts such ads into candidate ads that should have been counted against party or candidate contribution and spending limits; and (2) whether some of the ads that parties labelled as issue ads were really candidate ads that should have been counted against the party's section 441a(d) limit on coordinated expenditures. In particular, some have asked whether, due to the involvement of President Clinton, Senator Dole and their campaigns in party-sponsored issue ads, the cost of those ads -- which totaled $44 million for the DNC and $24 million for the RNC -- should be counted against each party's $12 million limit on coordinated expenditures or each candidate's spending limits of $37 million during the primaries and $74 million during the general election.

The answer to these questions turns, in part, on the legal test for distinguishing between candidate and issue ads. In Buckley v. Valeo, the Supreme Court upheld disclosure requirements for expenditures by independent groups on communications that "expressly advocate the election or defeat of a clearly identified candidate" and activities coordinated with a "candidate or his agent."[60] In a footnote, the Court offered specific examples of express advocacy, which have come to be known as the Buckley "magic words." The footnote listed: "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[61] A decade later, the Supreme Court reaffirmed the Buckley approach, holding that "a finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc."[62]

Lower courts and the FEC have since elaborated on the Buckley standard. In FEC v. Furgatch, the Ninth Circuit held that "the short list of words included in the Supreme Court's opinion in Buckley does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate."[63] The court accordingly adopted a standard for express advocacy that included not only Buckley's magic words, but also communications expressing an unmistakable and unambiguous message to vote for or against a clearly identified candidate, without using the Buckley magic words.[64] The FEC subsequently adopted a regulatory standard based in part on the Furgatch ruling.[65]

Two circuits have recently rejected the FEC's Furgatch-inspired approach. The First and Fourth Circuits have determined that a communication cannot constitute express advocacy under FECA unless it contains Buckley's magic words or other explicit language urging the election or defeat of a candidate.[66] The First Circuit took this position despite affirming its lower court's decision which described the FEC regulation as "a very reasonable attempt . . . drawn quite narrowly to deal with only the 'unmistakable' and 'unambiguous' cases."[67] The Supreme Court has yet to resolve this split among the circuits.

While the circuits have split on the precise contours of the Buckley standard, all of the courts that have reviewed issue or candidate ads under FECA have based their determinations on the content of the ad in question. No court has looked behind an ad's content to determine, for example, the intent of the ad's sponsors, the persons who participated in financing, developing or placing the ad, or the ad's intended or actual impact on a particular election. Thus, there is presently no legal authority which supports the proposition that the extent of a candidate's involvement could convert an ad from issue advocacy into candidate advocacy, particularly in the context of an ad sponsored by a political party.

Testimony was received by the Committee from several legal experts, including the FEC's general counsel Lawrence Noble, that issue ads sponsored by an independent group and coordinated with a candidate should be treated as a coordinated expenditure and candidate contribution, if the ad conveys an "electioneering message" benefiting the candidate.[68] Former FEC Chairman Trevor Potter testified that "whether it is express advocacy, or issue advocacy, or anything else, it is relevant to ask in the case of a nonparty organization whether the spending . . . was, in fact, directed and controlled by the candidate."[69] However, Noble and Potter both testified that a different legal analysis should apply to coordination involving only a party and its candidates, due to the longstanding legal presumption that party-candidate coordination is permissible and appropriate.[70] In 1995, the FEC did just that. Asked how party issue ads should be treated, the FEC focused on the ad's content, rather than on any party-candidate coordination. It determined that party ads which address "national legislative activity" and do not include an "electioneering message" promoting a particular candidate result in generic voter drive or administrative costs to the party payable with a mix of federal and nonfederal money -- no party contribution to a candidate resulted.[71] In reaching this decision, the FEC analyzed the content of the ad, not who was involved in preparing it, or what the party hoped its effect would be on an election.

The Attorney General stated in her recent letter to the Senate Judiciary Committee, not only that party-candidate coordination does not violate FEC as a general principle, but also that party-candidate coordination on a party's issue ads do not, as a matter of law, violate FECA.[72] She wrote:

> With respect to coordinated media advertisements by political parties (an area that has received much attention of late), the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message....
>
> We recognize that there are allegations that both presidential candidates and both national political parties engaged in a concerted effort to take full advantage of every funding option available to them under the law, to craft advertisements that took advantage of the lesser regulation applicable to legislative issue advertising, and to raise large quantities of soft political funding to finance these venture. However, at the present time, we lack specific and credible evidence suggesting that these activities violated the FECA.[73]

Coordination between parties and candidates has long been an accepted part of federal election law and campaign financing. Presidential candidates are considered the leaders of their parties.[74] Party-candidate coordination does not, in and of itself, violate FECA. Party-candidate coordination on party ads which expressly advocate the election of the candidate must comply with the party's limits on 441a(d) coordinated expenditures for that candidate. Party-candidate coordination on party ads that contain only a generic voter drive or issue message do not, under FEC rulings, have to be attributed to a particular candidate -- even if a candidate was involved in financing, developing or placing the ad; those party ads must instead comply with FEC allocation requirements for hard and soft money. Each of these areas would benefit from clarifying or strengthening legislation. Closing the soft money loophole, strengthening and clarifying the definition of express advocacy, and imposing disclosure requirements on issue ads that name candidates or appear close in time to elections are all possible legislative remedies to problems posed in this area.[75]

1. See FEC filings; see also, for example, Washington Post, 2/9/97. The $2.7 billion total does not include spending by independent groups that did not file with the FEC. The Washington Post estimated additional spending by independent groups on the 1996 federal elections at $70 million. Washington Post, 2/9/97.

2. See FEC filings. The Democratic Party spent about $336 million, and the Republican Party spent about $558 million during the 1996 election cycle.

3. See FEC filings; see also, for example, Washington Post, 3/31/97.

4. The Democratic Party's national campaign committees raised about $124 million in soft money, while the Republican Party's national campaign committees raised about $138 million. See FEC filings; see also, for example, Washington Post, 2/9/97, and 3/17/97. Compared to the previous presidential election cycle in 1992, the two parties raised three times as much soft money during the 1996 election cycle.

5. The DNC spent about $44 million on issue ads, while the RNC spent about $24 million on issue ads. See FEC filings; see also, for example, Annenberg Public Policy Center, "Issue Advocacy Advertising During the 1996 Campaign: A Catalog," Report Series No. 16, 9/16/97, pp. 32, 53.

6. See, for example, Letter from House Judiciary Committee Republican Members to Attorney General Reno, requesting appointment of an independent counsel to investigate possible violations of law in connection with the 1996 presidential campaign, 9/4/97.

7. See discussion of this provision, for example, in Congressional Research Service Report No. IB97045, 8/12/97, pp. 5-6.

8. See discussion of these provisions, for example, in letter from Attorney General Reno to House Judiciary Committee Chairman Henry Hyde of New York, 10/3/97, p. 7; and Congressional Research Service Report No. IB97045, 8/12/97, p. 6.

9. See discussion of this provision, for example, in letter from Attorney General Reno to House Judiciary Committee Chairman Henry Hyde of New York, 10/3/97, pp. 5-6.

10. See, for example, Congressional Research Service Report No. IB97045, 8/12/97, pp. 5-6.

11. Letter from Attorney General Reno to House Judiciary Committee Chairman Henry Hyde of New York, 10/3/97, p. 4.

12. Letter from Attorney General Reno to House Judiciary Committee Chairman Henry Hyde of New York, 10/3/97, p. 5; and Congressional Research Service Report No. IB97045, 8/12/97, p. 6.

13. 209 U.S. at 44.

14. See, for example, the Senate Ethics Manual (9/96), which states: "The criminal prohibition at section 607 was originally intended and was historically construed to prohibit anyone from soliciting contributions from federal clerks or employees while such persons were in a federal building. In interpretations of this provision, the focus of the prohibition has been directed to the location of the individual from whom a contribution was requested, rather than the location from which the solicitation had originated." See also United States v. Burleson, 127 F.Supp. 400 (E.D. Tenn. 1954) (campaign solicitation of federal employees while at a contractor worksite did not occur in a federal building and so did not result in a violation).

15. Congressional Research Service Report No. IB97045, 8/12/97, p. 7; see also memorandum dated 3/6/97, by Jack Maskell, legislative attorney, American Law Division, Congressional Research Service, "Soliciting Campaign Contributions in a Federal Building: 18 U.S.C. 607."

16. 3 Op. Off. Legal Counsel 31, 38-45 (1979); see also Congressional Research Service Report No. IB97045, 8/12/97, p. 7.

17. See, for example, Letter to Senate Judiciary Committee Chairman Orrin Hatch of Utah from Attorney General Reno, 4/17/97, pp. 4-5; see also statement by Senator Levin, Congressional Record, 10/1/97, p. S10277-82.

18. See Letter to Senate Judiciary Committee Chairman Orrin Hatch of Utah from Attorney General Reno, 4/14/97, p. 5 (citing 5 C.F.R. 2635.704 and 41 C.F.R. 201-21.601).

19. See discussion below.

20. See Letter from Attorney General Reno to House Judiciary Committee Chairman Henry Hyde of New York, 10/3/97, p. 5.

21. See Congressional Research Service Report No. IB97045, 8/12/97, pp. 8-9.

22. U.S. General Accounting Office, Principles of Federal Appropriations Law (7/91), p. 4-2, cited in memorandum dated 9/6/96 by Jack Maskell, legislative attorney, American Law Division, Congressional Research Service, "Use of Federal Appropriations for Non-Official, Political Campaign Purposes," pp. 3-4.

23. Decision of Comptroller General, B-147578, 11/8/62, p. 5, cited in memorandum dated 9/6/96 by Jack Maskell, legislative attorney, American Law Division, Congressional Research Service, "Use of Federal Appropriations for Non-Official, Political Campaign Purposes," p. 4.

24. Memorandum by Jack Maskell, legislative attorney, American Law Division, Congressional Research Service, "Use of Federal Appropriations for Non-Official, Political Campaign Purposes," 9/6/96, p. 7.

25. 5 U.S.C. § 7324(a); see also Congressional Research Service Report No. IB97045, 8/12/97, p. 8.

26. 5 U.S.C. § 7323(a)(2). Section 7323(a)(2) makes an exception for the solicitation of contributions in a few limited instances involving employee organizations, not relevant here. See also 5 C.F.R. 734.101(b) which defines accepting a contribution as taking "possession . . . officially on behalf of a candidate, a campaign, a political party, or a partisan political group, but does not include ministerial activities which precede or follow this official act." 18 U.S.C. § 607(b) allows Congressional staff to accept contributions in a federal building if the contribution is forwarded within seven days to the appropriate campaign committee.

27. 5 U.S.C. § 7323(a)(1).

28. 5 U.S.C. § 7323.

29. 5 U.S.C. § 7323 (Hatch Act applies to "any individual, other than the President and the Vice President, employed or holding office in . . . an Executive agency").

30. 5 U.S.C. § 7324 (b)(2)(B)(i); see 5 C.F.R. 734.502; Congressional Research Service Report No. IB97045, 8/12/97, p. 8.

31. 5 U.S.C. § 7323(a)(2); see Congressional Research Service Report No. IB97045, 8/12/97, p. 8.

32. 5 U.S.C. § 7324(b); 5 C.F.R. 734.503; see Congressional Research Service Report No. IB97045, 8/12/97, p. 8.

33. See, for example, 5 C.F.R. 734.503, Example 3: "The head of an executive department may hold a partisan 'political' meeting or host a reception which is not a fundraiser in his conference room during normal business hours."

34. 5 C.F.R. 734.101.

35. 6 Off. Legal Counsel 214, 217 (1982).

36. 6 Off. Legal Counsel 214, 217 (1982).

37. 6 Off. Legal Counsel 214, 217 (1982).

38. 5 C.F.R. 734.503.

39. 5 C.F.R. 734.503.

40. Kathryn Dunn Tenpas, "Institutionalized Politics: The White House Office of Political Affairs," Presidential Studies Quarterly (Spring 1996).

41. For the first twelve years under President Reagan and President Bush, OPA staff members served as liaisons to the Republican national, state and local party organizations; coordinated activities with the congressional campaign committees; did political outreach to targeted

constituency groups; worked to obtain appointments to federal positions and offices for political supporters; provided assistance to candidates in mid-term elections; and helped plan the president's re-election campaign. Kathryn Dunn Tenpas, "Institutionalized Politics: The White House Office of Political Affairs," Presidential Studies Quarterly (Spring 1996) p. 512. OPA staff under President Clinton engaged in similar activities. See also Harold Ickes, 10/7/97 Hrg. Pp. 85-90.

42. Memorandum to All White House Staff from C. Boyden Gray, Counsel to the President, re "Political Activity," 11/27/91, p. 4, n. 3.

43. Memorandum to All White House Staff from L. Cutler & C. Mills re: Political Activity, 4/6/94, p. 2, n. 2.

44. See Memorandum by Jack Maskell, legislative attorney, American Law Division, Congressional Research Service, "Use of Federal Appropriations for Non-Official, Political Campaign Purposes," 9/6/96, p. 7.

45. The constitutionality of section 441a(d)'s limits on coordinated expenditures by parties was questioned by several Supreme Court Justices in Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996), but no ruling was made by the Court on that issue. In Buckley v. Valeo, 424 US 1, 47 (1976), in dicta, the Supreme Court analogized coordinated expenditures to contributions which it held could be constitutionally limited; in the Colorado case, in dicta, some Justices analogized coordinated expenditures to direct spending by candidates which Buckley held cannot constitutionally be limited.

46. 2 U.S.C. § 441a(d)(2).

47. 2 U.S.C. § 441a(b).

48. RNC v. FEC, 616 F.2d 1 (2d Cir.) (en banc), aff'd mem., 445 U.S. 955 (1980). One presidential candidate during 1996, Steve Forbes, declined to accept public financing and was not subject to spending limits.

49. See 2 U.S.C. § 441a(c), and 11 C.F.R. 9035.1(a)(1).

50. See, for example, 2 U.S.C. § 431(9)(B)(iv) and (viii) and 11 C.F.R. 102.17 (joint fundraising by parties and candidates, and allocating associated expenses).

51. FEC Advisory Opinion 1984-15.

52. Letter to Senate Judiciary Committee Chairman Orrin Hatch of Utah from Attorney General Reno, 4/14/97, pp. 6-7.

53. FEC Advisory Opinion 1988-22.

54. See, for example, opinion by Justice Kennedy; see also footnote 45, supra.

55. 2 U.S.C. § 432(e)(3)(A)(i); 11 C.F.R. 102.12(c)(1).

56. See, for example, FEC v. Massachusetts Citizens for Life,479 U.S. 238 (1986); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990); see also legal analysis in part 2 on independent groups, supra.

57. See 11 C.F.R. 106.5. In a letter dated 6/4/97, President Clinton petitioned the FEC to change these regulations and prohibit parties from raising and spending soft money.

58. See 11 C.F.R. 102.17 (joint fundraising by parties and candidates, and allocating associated expenses).

59. See, for example, FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997).

60. 424 U.S. 1, 80 (1976). The Court reached this ruling with respect to "individuals and groups that are not candidates or political committees." 424 U.S. at 80.

61. 424 U.S. at 44 n.52.

62. FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 248-49 (1986) (quoting Buckley).

63. 807 F.2d 857, 863 (9th Cir. 1987).

64. 807 F.2d at 864.

65. 11 C.F.R. 100.22(b) ("Expressly advocating means any communication that ... could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because -- (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.") (original emphasis).

66. See FEC v. Christian Action Network, 110 F.3d 1049, 1055 (4th Cir. 1997) (holding that Buckley requires express or explicit words of advocacy of election or defeat of a candidate); Maine Right to Life Committee. v. FEC, 98 F.3d 1 (1st Cir. 1996) (invalidating FEC regulation).

67. Maine Right to Life Committee v. FEC, 914 F. Supp. 8, 10 (D. Me. 1996), aff'd, 98 F.3d 1 (1st Cir. 1996) (per curiam).

68. Lawrence Noble, 9/25/97 Hrg. Pp. 34-40. The FEC is currently in litigation to determine whether this position -- that issue ads sponsored by an independent group, coordinated with a candidate, and containing an electioneering message result in a contribution to the candidate -- is correct. See also legal analysis of independent groups coordinating with candidates in Part 2, supra.

69. Trevor Potter, 9/25/97 Hrg. P. 36.

70. Lawrence Noble and Trevor Potter, 9/25/97 Hrg. Pp. 35-36, 39-40. Potter testified that the FEC had traditionally "presumed all party spending was coordinated with candidates" and had deemed coordination between the two irrelevant, concentrating instead on determining whether specific party expenditures were generic party-building efforts that could not be attributed to individual candidates or candidate-specific spending subject to contribution limits. Trevor Potter, 9/25/97 Hrg. P. 22. See also legal analysis of independent groups coordinating with candidates in Part 2, supra.

71. FEC Advisory Opinion 1995-25; see also FEC Advisory Opinion 1985-14; and letter to Senate Judiciary Committee Chairman Orrin Hatch of Utah from Attorney General Reno, 4/14/97, p. 7.

72. Letter to Senate Judiciary Committee Chairman Orrin Hatch of Utah from Attorney General Reno, 4/14/97, pp. 6-7.

73. Letter to Senate Judiciary Committee Chairman Orrin Hatch of Utah from Attorney General Reno, 4/14/97, p 7.

74. See, for example, Harold Ickes, 10/7/97 Hrg. P. 85.

75. S. 25, the McCain-Feingold campaign finance reform bill, proposes a variety of legislative remedies on soft money, issue advocacy and coordination.